No. 95-1858
No. 96-110

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

VACCO *et al., Petitioners*, v. **QUILL** *et al., Respondents*.

On Writ Of Certiorari To The U.S. Court Of Appeals
For The Second Circuit

WASHINGTON *et al., Petitioners*, v. **GLUCKSBERG** *et al., Respondents*.

On Writ Of Certiorari To The U.S. Court Of Appeals
For The Ninth Circuit

BRIEF OF THE NATIONAL CATHOLIC OFFICE FOR PERSONS WITH DISABILITIES AND THE KNIGHTS OF COLUMBUS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Of Counsel:

PAT A. CIPOLLONE
General Counsel

CARL A. ANDERSON
Vice President for
Public Policy
KNIGHTS OF COLUMBUS

JAMES BOPP, JR.
THOMAS J. MARZEN
DANIEL AVILA*
JANE E.T. BROCKMANN
NATIONAL LEGAL
CENTER FOR THE
MEDICALLY DEPENDENT
& DISABLED, INC.
50 South Meridian, Ste. 200
Indianapolis, Indiana 46204
317-632-6245

* Counsel of Record

Dated: November 12, 1996

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QUESTION PRESENTED

Your Amici adopt the Questions Presented by the States of Washington and New York.

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INTERESTS OF THE AMICI CURIAE

The National Catholic Office for Persons with Disabilities (NCPD is a non-profit organization established in 1982 to promote the inclusion of ten million Catholics with disabilities and their families into the mainstream of our society and the Catholic Church. It fulfills its mission through offering its expertise and resources to a national network of disability offices as well as to the U.S. Catholic Conference and other national Church-related organizations. A critical aspect of this nation office's mission is to highlight the value of each life and to encourage the creation of environments which allow each individual to fulfill their potential. If a "right" to assisted suicide for the terminally ill is lodged in the Constitution, then the goals and programs NCPD is pursuing in the interest of persons with disabilities will be for nought. NCPD opposes the legal and social devaluation of persons with disabilities, many of whom have or are regarded as having terminal conditions. Such devaluation will surely result from a constitutional rule transforming their fundamental right to life from an unalienable right to a merely alienable interest based solely on life expectancy.

The Knights of Columbus is an international Catholic fraternal organization of 1.5 million members dedicated to advancing the ideals of charity, unity, fraternity, and patriotism through its activities around the world. The Knights of Columbus engages in a broad range of social action programs to protect the family, and it devotes a considerable portion of its resources and volunteer efforts to aiding persons with illnesses and disabilities, as well as the less fortunate. This brief was written with the support of funds provided by the Knights.

The parties have consented to the filing of this brief. Pursuant to the Rules of this Court, letters of consent from the parties have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

This brief examines the consequences of mandating the selective alienation of the right to live by constitutionalizing an exemption to the homicide code based on the terminal condition of the victim, enabling physicians to assist in suicide by prescribing a lethal drug overdose. Your Amici argue that the decisions in *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996), and *Quill v. Vacco*, 80 F.3d 716 (1996), involving Fourteenth Amendment challenges to Wash. Rev. Code Ann. § 9A.36.060 (West 1975) and N.Y. Penal Law §§ 120.30 & 125.15 (McKinney 1987), should be reversed.

The rulings below threaten the integrity of our Nation's social covenant, founded as it was on the belief that certain human rights are so fundamental in nature that they cannot be alienated. The Declaration of Independence announced to the world that the American colonists could no longer endure British encroachments on their fundamental and unalienable interests, including especially their right to life. So the doctrine of unalienable rights provided the basis for rebellion and launched a new experiment in American self-governance. Bound up as it is within our legal history and tradition, the governmental duty to respect the unalienable rights of the people serves to this day as a safeguard against tyranny.

The constitutional rule proposed by the courts below would radically transform the right to live from an unalienable right to a merely alienable interest for the most vulnerable persons in society — those having or regarded as having terminal conditions. The rule would permit members of this class to renounce the protections of the homicide code by consenting to another's criminal act of providing suicide assistance, and would force the states to treat the lives of all members of this class as less worthy of protection against homicide. The rule would discount the right to live for all members of this class, regardless of whether they seek to die or desire to live.

At the same time, the rule would endorse the purposeful causing of death, a "right" wholly unique in constitutional law because it encompasses an abuse of liberty. Every other protected freedom is closely related to the constitutional objectives of preserving existence and providing opportunities for social participation. By extending this "right" only to persons with terminal conditions, the courts below would further subject members of this class to social alienation and devaluation.

The lower courts misread the common and statutory law by deriving therefrom a line based on the victim's terminal condition to distinguish the supposed "right" to purposely cause death from the criminal wrong of assisted suicide. Their decisions conflict with the criminal law, which rejects criminal defenses based on the victim's life expectancy and consent. The courts impinged upon the states' exclusive authority to define crimes by mandating such defenses as a constitutional rule. Moreover, the rulings below conflict with this Court's decision in the case of *United States v. Rutherford*, 442 U.S. 544 (1979). *Rutherford* rejected the federal courts' authority to carve a terminal condition exception into otherwise uniform laws designed to protect all persons against dangerous drugs regardless of their life expectancy.

A rule that deems the suicides of persons with terminal conditions to be constitutionally permissible, while leaving the states free to continue their protection of all other persons, inserts into the Constitution an invidious double standard. This Court should reject such a rule and uphold the states' authority to protect the lives of all of its citizens, regardless of condition. The Constitution should not be construed as if it were a suicide pact.

ARGUMENT

I. Our Nation Is Founded On The Principle That Fundamental Human Rights, Particularly The Right To Live, Are Unalienable; A Ruling Granting Constitutional Protection To An Interest In Obtaining Physician-Prescribed Drugs To Purposely Cause Death Would Abandon This Principle.

The Ninth and Second Circuits recognized in *Compassion in Dying* and *Quill* a constitutional right to renounce the protections of the homicide code which deter persons from assisting in the suicides of others with terminal conditions. Properly understood, the alienation of the right to live involves the rejection of otherwise applicable protections against direct threats to one's life. As one commentator explains, "What is given up in the case in which the right to life is waived . . . is not life itself; rather it is the *protection* of life that that right bestows on its possessor." Terrence McConnell, *The Nature and Basis of Inalienable Rights*, 3 Law and Philosophy 25, 37 (1984). Consequently, the constitutional claim before this Court asserts in essence that at least some individuals should be empowered to forgo their right to be protected under the homicide code, thereby alienating their right to live.

If adopted by this Court, then a constitutional rule authorizing some individuals to alienate their right to live based on their life expectancy would undermine principles embraced in the Declaration of Independence. The Declaration put the case for the American rebellion against British rule. The American colonists charged England with "injuries" to and "usurpations" of "certain unalienable rights", including "among these . . . life". Because the King and Parliament assumed a form of government "destructive of these ends", the people had the right to "alter" or "abolish" the old and "institute [a] new government". *The Declaration of Independence* para. 2 (U.S. 1776). In sum, the unalienable rights doctrine provided the essential basis for the American Revolution.

The Declaration's principles have acquired a life of their own, extending their influence far beyond the document's four corners. There is universal agreement that it is,

> the greatest absurdity to suppose it in the power of one or any other number of men at the entering of society, to renounce their essential natural rights, or the means of preserving those rights when the great end of civil government . . . is for the support, protection and defence of those very rights [including] life . . . .

Samuel Adams, *The Rights of the Colonists*, *in* The Founders' Constitution 394, 395 (Philip B. Kurland & Ralph Lerner eds. 1987).

Twenty-nine states have either expressly incorporated the unalienable rights doctrine into their constitutions or adopted constitutional provisions comporting with the doctrine.[1] Furthermore,

> *the Declaration of Independence is . . . funda-*

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[1]The constitutions of twenty three states refer expressly to the "unalienable" or "inalienable" right to life. *See* Ala. Const. Art. I, § 1 (1975); Ark. Const. Art. 2, § 2 (1987); Cal. Const. Art. 1, § 1 (1984); Colo. Const. Art. II, § 3 (1973); Fla. Const. Art. 1, § 2 (1990); Haw. Const. Art. I, § 2 (1993); Idaho Const. Art. I, § 1 (1993); Ill. Const. Art. I, § 1 (1993); Iowa Const. Art. 1, § 1 (1989); Kan. Const. Bill of Rights § 1 (1980); Ky. Const. Bill of Rights § 1 (1988); Me. Const. Art. I, § 1 (1985); Mass. Const. Pt. 1, Art. I, (1978); Mont. Const. Art. II, § 3 (1995); Neb. Const. Art. I, § 1 (1995); Nev. Const. Art. 1, § 1 (1995); N.J. Const. Art. 1, para. 1 (1971); N.M. Const. Art. II, § 4 (1992); N.C. Const. Art. I, § 1 (1995); N.D. Const. Art. I, § 1 (1981); Ohio Const. Art. I, § 1 (1994); Utah Const. Art. I, § 1 (1991); Vt. Const. Chap. I Art. 1 (1996). Three other state constitutions refer either to a right to life that is "indefeasible" (Pa. Const. Art. I, § 1 (1994), or one that cannot be "divest[ed]". Va. Const. Art. I, § 1 (1995) & W. Va. Const. Art. III, § 1 (1983). New Hampshire's constitution refers to the right to life as "natural", "essential" and "inherent". N.H. Const. Pt. 1, Art. 2 (1988). Two other state constitutions contain provisions that comport with the unalienable rights doctrine. La. Const. Art. 1, § 1 (1996) (prohibiting euthanasia) & Miss. Const. Art. 3, § 19 (1974) (prohibiting duelling).

> *mental to a proper understanding of the [federal] Constitution;* and . . . abundant support for this proposition can be found in the leading writings and debates of the Founding era. Indeed, it would hardly be an exaggeration to say that the most fundamental pronouncements made in connection with the framing and ratification of the Constitution are restatements of the principles articulated in the [Declaration] . . . .

Dan Himmelfarb, Note, *The Constitutional Relevance of the Second Sentence of the Declaration of Independence*, 100 Yale L. J. 169, 170-71 (1990) (emphasis added); *see also Monangahela Navigation Co. v. United States*, 148 U.S. 312, 324 (1893) (noting that the Bill of Rights was adopted to protect "those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights"); *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U.S. 150, 159-60 (1897); *McGowan v. Maryland*, 366 U.S. 420, 563 (1961) (Douglas, J., dissenting) ("[T]he body of the Constitution as well as the Bill of Rights enshrined those principles [of the Declaration].").

The Fourteenth Amendment was drafted with the Declaration very much in mind. *See* Hermine H. Meyer, *The History and Meaning of the Fourteenth Amendment* 75 (1977) (referring to remarks during congressional debates on the Amendment by a sponsor, Representative Thaddeus Stevens, who observed that "I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our DECLARATION or organic law.") (capitalization in original).

Finally, the unalienable rights doctrine serves as an international measure of humane and just governments. *See* Preamble to the Universal Declaration of Human Rights, *reprinted in* Paul Sieghart, *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights* 172 (1985) (asserting that "recognition of the inherent dignity and

of the equal and inalienable rights of the all members of the human family is the foundation of freedom, justice and peace in the world"); *id.* at 42 (observing that while international human rights law recognizes that some rights can be acquired or renounced through personal transactions, "none of this applies to 'human' rights. . . . [T]he code [of international human rights laws] simply treats us as coming into the world with them. . . . nor can we sell them, mortgage them, or forfeit them").

Assisted suicide and voluntary active euthanasia "can both be viewed as efforts to alienate the inalienable, to give away what cannot properly cannot be given away." Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 Philosophy & Public Affairs 93, 93 (1978). In accord with this principle, the states have prohibited the aiding and abetting of suicide, along with other forms of consensual homicide and self-harm. *See, e.g., Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 n.15 (1972) (referring to laws against such consensual activities as "bare fist" prize fights and duelling); *Martin v. Commonwealth*, 184 Va. 1009, 37 S.E.2d 43, 47 (1946) (consent is no excuse for homicide because the right to life is unalienable); *State v. Moore*, 25 Iowa 128, 135-36 (1868) (recognizing that the "right to life and to personal safety is not only sacred in the estimation of the common law, but it is inalienable").

Accordingly, this Court should not abandon a core doctrine upon which this Nation was founded, but instead should affirm laws that, by uniformly forbidding suicide assistance, preserve the unalienability of the right to live and thereby respect the equal dignity of all persons. Such laws reflect our founding principles, and they are just as vital to our society today as they were 200 years ago.

As one commentator explained,

> [the Declaration] linked the unalienable rights of individuals with the people's right to rebel. In the background there is the basic idea that a

> social contract of some sort had been made in which the people transferred certain rights to government in return for something. . . . What rights the people transferred is less important than the rights they did *not* transfer because they were not transferable, that is to say, unalienable. Unalienable rights were thought to be held under *any* form of government so that when a government merely showed signs of wishing to invade these rights, it could be regarded as intending to reduce the people under absolute despotism.

Morton White, *The Philosophy of the American Revolution* 239-40 (1978).

In view of the nexus between unalienable rights and the limits on despotic governance, a constitutional policy endorsing the selective alienation of the right to live raises profound questions. As one commentator has observed, "[W]e must recall that [John Locke] puts the inalienability of the right to life to good purposes when he uses it to explain why a government can never legitimately acquire an absolute rule to dispose of the lives of its citizens." Lance K. Stell, *Dueling and the Right to Life*, 90 Ethics 7, 16 (1979). Thus, the right to live is a fundamental human interest "that no man *should* transfer to any person or any government." White, *American Revolution* at 220.

What damage will be inflicted on the inviolability of life by a constitutional rule rejecting its unalienability? Will governments be free to acquire absolute dominion over persons whose fundamental rights are deemed personally transferable and thus disposable? Will society become even more coursened in its disregard for the sanctity of human life? These questions cannot be ignored because constitutional rules cannot be imposed in a vacuum.

Moreover, a rule supposedly grounded in notions of autonomy and individual freedom will unjustifiably alter the

legal status of those who have no desire to kill themselves, but who nevertheless will be swept into the category of persons deemed to have an alienable right to live. The right to live and all rights flowing therefrom will be rendered alienable not because an individual so chooses, but on account of the individual's condition. If some persons with terminal conditions are permitted to alienate their right to live because they are terminally ill, then all persons with terminal conditions will necessarily be free to make the same choice. As a consequence, by virtue of constitutional mandate and irrespective of individual desires, the right to live for all members of this class will be reduced to an inferior, alienable status. Because every member of the affected class will no longer possess an unalienable right to live, each will be left with a weaker claim, or no claim at all, against tyrannical notions of "normalcy" and "quality of life" policy-making.[2]

Finally, a constitutional rule that permits some — but not all — persons to alienate their right to live cannot be squared with the Declaration's finding and the Fourteenth Amendment's proviso that *all* persons are created equal and as a result are equally endowed with unalienable rights. Once it is posited that some persons have only an alienable right to live, then an inequality of human dignity profoundly hostile to our Nation's founding principles not only will threaten the fundamental interests of the vulnerable, but also

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[2]One commentator has remarked on

> just how dangerous enforced physiological normality is when the definition of its parameters falls into the hands of politicians and bureaucrats. . . . [T]he war against "abnormality" implies a dangerous kind of politics, which begins with a fear of difference and eventuates in a tyranny of the normal. That tyranny, moreover, is sustained by creating in those outside the norm shame and self-hatred — particularly if they happen to suffer from that vast majority of "deformities" which we still cannot prevent or cure.

Leslie A. Fiedler, *The Tyranny of the Normal*, Hastings Center Report, Apr. 1984, at 40, 41, 42.

will imperil the integrity of our constitutional order.

II. A Constitutional Rule Permitting Persons To Alienate Their Right To Live Because They Have, Or Are Regarded As Having, A Terminal Condition Lacks A Legitimate, Non-Invidious Basis.

The Ninth and Second Circuits ruled that at least in some cases suicide assistance is constitutionally protected, and that a line must be drawn between the criminal wrong and the constitutional right based on the victim's life expectancy. The "courts may not", however, "draw lines which appear arbitrary without . . . offering a justification." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 870 (1992). The line chosen by the lower courts not only *is* arbitrary, but also is based on the invidious assumption that the lives of persons with terminal conditions are less worthy or deserving of protection.[3]

The Ninth and Second Circuits claimed that the common law and state statutes governing treatment refusals provided the basis for recognizing in the assisted suicide context a diminishing state interest in "preserving" the lives of persons with terminal conditions. The courts misread the law, however, and confused an interest in "preserving" life with the states' separate interest in "protecting" life.

The "terminal condition" line cannot be adduced from an accurate reading of the common law of informed consent, which extends the right to refuse treatment to all persons regardless of life expectancy. 1 Alan Meisel, *The Right to Die* 490-91 (2d ed. 1995) (referring to case law extending the right to refuse treatment to persons who are not terminally

[3]*See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985) (observing that certain classifications "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and apathy — a view that those in the burdened class are not as worthy or deserving as others").

ill). Advance directive statutes often limit their scope to cases involving incompetent persons who are terminally ill, but they must be read together with the broader common law rule. Rather than limiting treatment refusals, these statutes establish a legal "safe harbor" for advance directive decision making. *See* 2 Meisel, *The Right to Die* at 85 (noting that most advance directive statutes expressly decline to supersede the common law or to set out the sole means by which the right to refuse treatment may be exercised; also noting that a majority of courts has therefore concluded that such legislation does not preempt or otherwise narrow the common law).

Moreover, whether a person has a terminal condition is relevant to the treatment refusal context only for reasons quite irrelevant to the assisted suicide context. When weighing the benefits and burdens of accepting medical treatment, a patient must necessarily consider the treatment's capacity to extend life. If a patient is terminally ill, so that the treatment will not extend his or her life indefinitely, then the state's interest in preserving life will not be implicated. *See In re Grant*, 109 Wash. 2d 545, 556, 747 P.2d 445, 451 (1987) (observing that state interest in "preserving life" by requiring "lifesaving" treatment "weakens considerably . . . if treatment will merely postpone death for a person with a terminal and incurable condition"). The state's interest in preserving life is measured according to the effectiveness of treatment in question, and does not depend on any value assessment of the lives at stake. *See also Fosmire v. Nicoleau*, 551 N.Y.S. 2d 876, 881, 551 N.E.2d 77, 82-83 (1990) (holding that patients' terminal condition is relevant only "to determine whether [this is] the circumstance[] in which the patients intended to decline the medical care" and not "because the State considered their lives worthless").

In the assisted suicide context, however, the issue is not whether the state has an interest in *preserving* life by providing treatment, but whether the state may seek to *protect* all lives against direct killing. Persons with terminal conditions are still alive, whether or not their lives can be indefinitely extended by life supports. Thus, even when it is impossible

to effectuate the state's interest in preserving their lives because life-sustaining measures are unavailing, the separate issue remains as to whether the state's interest in protecting life against killing should apply.

Consequently, the lower courts engaged in pretextual reasoning by referring to the common law of consent and the statutory law governing advance directives as bases for drawing a line at terminal condition. *See Compassion in Dying*, 79 F.3d at 817-20 and *Quill*, 80 F.3d at 727-28; *but see* 79 F.3d at 819 (quoting preamble to Washington's advance directive statute expressing the legislature's finding that without qualification "adult persons" have the right to control medical decisions, and importantly, that this right is not limited to but "*includ[es]*" those decisions involving "instances of terminal condition", thereby extending the right to refuse treatment both to persons who are and who are not terminally ill) (emphasis added) & *Fosmire*, 551 N.Y.S.2d at 881, 551 N.E.2d at 82 (finding that common law right to refuse treatment in New York extends to all competent adults regardless of condition).

As the next two sections will demonstrate, neither the criminal law nor the constitutional rulings of this Court provide an alternate basis for mandating an exemption from the homicide code based on the victim's life expectancy. To the contrary, our legal history and tradition, as well as this Court, have rejected the victim's condition as constitutionally irrelevant.

A. *Considerations Under The Criminal Law: The Definition Of Homicide And The "Last Spark Of Life".*

Criminal jurisprudence provides an instructive approach to resolving whether a non-invidious foundation exists for using a suicide victim's terminal condition as a constitutional dividing line. Many of the arguments favoring a limited right to assisted suicide for persons with terminal conditions resemble the defenses that might be raised in a trial for homicide. Thus, the definitional elements of causation, intent,

excuse, and justification provide a useful framework for addressing — and ultimately rejecting — any claim that a suicide victim's life expectancy is at all constitutionally relevant.

For example, the Ninth Circuit raised an argument sounding in causation by contending that a decision to hasten death should not be classified as suicide when the victim's "death is already in process". *Compassion in Dying*, 79 F.3d at 824. *But see People v. Moan*, 4 P. 545 (Cal. 1884) ("If a patient is lying in the last stages of consumption, with a tenure upon life that cannot possibly continue for a day, it is homicide to administer a poison to him by which his life is ended almost immediately.")

In addition, an amicus brief filed with the Ninth Circuit asserted that in cases involving suicidal persons with terminal conditions, the participants necessarily lacked the requisite criminal intent. Instead, the suicide assistant "seeks to end the [victim's] dying process", and the victim "does not have the primary goal of ending his life", because "[g]iven the terminal nature of his condition, the [victim] wants to end his suffering by shortening the dying process." Amicus Curiae Brief of the Americans for Death With Dignity and Euthanasia Research & Guidance Organization at 4 n.6, *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (No. 94-35534). *But see Gilbert v. State*, 487 So. 2d 1185, 1191 (Fla. App. 1986) (rejecting defense to homicide based on claim that defendant sought only to end the victim's suffering because it would "sanction open season" for the killing of vulnerable persons).

Moreover, assisted suicide is defensible in The Netherlands on the excuse-related ground that a physician charged with a crime should not be convicted if he or she participated in a suicide under emotional duress, and was compelled to end another's misery when confronted with the victim's condition. Herbert Hendin, *Seduced by Death* 94, 103, 109 (1997). *But see State v. Fuller*, 203 Neb. 233, 243, 278 N.W.2d 756, 762 (1979) ("Duress or compulsion is no excuse to the charge of homicide.").

Finally, the respondents in *Glucksberg* raise a justification-related defense by asserting that any conflict between the state's interest in protecting life and an individual's interest in death must tilt in favor of death when the life at stake is of a "limited *quantity*". Opposition to Petition for Writ of Certiorari at 12, *Washington v. Glucksberg* (No. 96-110). ***But see*** *State v. O'Brien*, 46 N.W. 752, 753 (Iowa) ("The fact that [the homicide victim] was afflicted with a disease which might have proved fatal would not justify the wrongful acts of defendant . . . .").

The Ninth and Second Circuits would impose these theories on the states as constitutional mandates, contrary to this Court's long line of precedents leaving to the states the authority to define crimes, particularly in reference to the "doctrines of *actus reus, mens rea,* insanity, mistake, justification and duress". *Montana v. Egelhoff*, 64 U.S.L.W. 4500, 4505 (U.S. June 13, 1996) (No. 95-566). Moreover, such mandates would conflict with our legal history and tradition, which unanimously reject any defenses to homicide based on the victim's health status.

One court described the rule of law as follows:

> But though a human body must be alive in order that it may be the subject of homicide, yet the quantity of vitality which it retains at the moment the fatal blow is given, and the length of time life would otherwise have continued, are immaterial considerations. If any life at all is left in the human body, even the least spark, the extinguishment of it is as much homicide as the killing of the most vital being.

State v. Francis, 149 S.E. 348, 364 (S.C. 1929). *Accord State v. Mally*, 366 P.2d 868, 873-74 (Mont. 1961); *People v. Stamp*, 82 Cal. Rptr. 598, 603 (Cal. App.), *cert. denied*, 400 U.S. 819 (1970); *see* Daniel Avila, *Is the Constitution a Suicide Pact?*, 35 Duquesne Law Review 201, 227-230 (1996) (discussing these and other cases).

In light of this rule and its broad acceptance in our law, any attempted justification for abandoning to their suicidal impulses only persons with terminal conditions, and exposing only them to the undeterred efforts of others to assist in their deaths, bolsters the inference that an invidious disregard for the lives of the vulnerable is at play. If "[a]n accused cannot speculate as to how long his victim may live with an incurable malady when he inflicts a shot or a wound that hastens the death or the action of the fatal disease" (*State v. O'Brien*, 46 N.W. 752, 753 (Iowa 1890)), then neither should the Constitution.

If this Court were to adopt the contrary position and hold as a matter of constitutional law that the victim's proximity to death is relevant to the culpability of an individual charged with assisting suicide, then the definitional ramifications would be far-reaching. Assisted suicide cannot be distinguished from other forms of homicide. If the victim's condition is deemed relevant in the assisted suicide context, then it must also be relevant in any case of homicide. As a result, virtually any defendant accused of a homicidal act would have the constitutional right to raise the victim's debilitated condition as a defense.

By definition then, crimes against life would be limited only to those life-threatening acts which imperil the healthy and long-living. Those charged with mortally attacking an individual deemed to be in an accelerated "process of dying" could avoid conviction. Because "process of dying" is an inherently expansive concept — all persons are going to die sometime and many are going to die sooner than expected for a variety of reasons — an assortment of defense claims based on the victim's condition would emerge in a host of cases.[4]

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[4]Such a rule would also open the door to constitutional defenses based on the victim's consent, thereby overriding state policies rejecting such defenses in cases involving homicide and other crimes. *See, e.g., State v. Fuller*, 203 Neb. at 241, 278 N.W.2d at 761 (holding that "murder is no less murder because the homicide is committed at the desire of the victim"); *Jones v. State*,

B. *Considerations Under The Constitution: Fourteenth Amendment Exemptions And United States v. Rutherford.*

This Court's unanimous decision in *United States v. Rutherford*, 442 U.S. 544 (1979), rejected a similar exemption based on a person's terminal condition. The Court ruled that a uniform federal ban against the interstate transfer of unsafe or unproven drugs reasonably applied to an experimental and potentially harmful substance (laetrile) sought by persons with terminal cancer as a last ditch means of extending their lives. *Id.* at 559. The Court found that "[f]or the terminally ill, as anyone else, a drug is unsafe if its potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit." *Id.* at 556. Moreover, "it is often impossible to identify a patient as terminally ill except in retrospect." *Id.* at 556. Finally, the Court was unwilling to endorse the proposition "that . . . safety and efficacy standards . . . have no relevance for terminal patients" because this would "deny the [government's] authority over all drugs, however toxic or ineffectual, for such individuals." *Id.* at 557-58. Thus, the Court refused to read an implied exception into an otherwise generally applicable statute since "federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." *Id.* at 555.

Rutherford should pose a significant obstacle to any constitutional claim for assisted suicide based on a victim's proximity to death. If Congress may restrict the use of dangerous drugs by persons with terminal conditions seeking to prolong their lives, then surely the states may deter physicians from supplying lethal dosages to members of the same class who want to end their lives. The parallels between the two cases simply cannot be ignored.

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640 So. 2d 1084 (Fla. 1994) (rejecting claim of a right to such a defense under the state constitution in a case involving charges brought under statutory rape law, even though the victim "did not want the 'protections' advanced by the state").

Thus, in light of *Rutherford*, laws discouraging drug-induced deaths among the terminally ill, as for anyone else, reasonably furthers the states' general goal of protecting life. The constitutional balance between state interests and competing private interests should not be shifted according to the victim's life expectancy. In sum, the terminally ill are similarly situated with everyone else in relation to the states' interest in protecting life. For the Court to hold otherwise, it would have to abandon *Rutherford* and entirely reverse its course with respect to constitutional exemptions generally.

III. A Constitutionally-Mandated Policy Permitting The Selective Alienation Of The Right To Live Based On A Suicide Victim's Life Expectancy Threatens The Welfare And Safety Of Vulnerable Persons And Imperils Ordered Liberty.

To deflect concerns about assisted suicide raised by persons with disabilities and members of other vulnerable populations, the Ninth and Second Circuits responded with assurances that suicide is a constitutional benefit. *Compassion in Dying*, 79 F.3d at 825-26; *Quill*, 80 F.3d at 730. Based on the considerations addressed in the remainder of this brief, your Amici disagree strongly.

A. *Unlike Any Other Constitutional Freedom, A "Right" To Alienate One's Right To Live Licenses The Intentional Destruction Of Persons' Lives.*

In no other case has the Supreme Court been asked to license an individual to assist in the intentional destruction of life at the request of the victim. All other claims of personal freedom granted constitutional protection have related in some meaningful way to the individual's enjoyment of life and continued participation in society. Thus, the Supreme Court has "reject[ed] at the outset the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke" a constitutional remedy. *Meachum v. Fano*, 427 U.S.

215, 224 (1976). Whether an asserted interest to act free from government interference rises to the level of a constitutional right will depend on its "nature" — that is, its relation to the "'whole domain of social and economic fact'" (*Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (citation omitted)), as well as on its connection to an individual's ability to "'engage in any of the common occupations of life'". *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972) (citation omitted).

Conversely, a "right" or "liberty" to obtain suicide assistance would lack any relation to the capacity to exist, move freely, and form personal attachments in society; it would be entirely antithetical to such exercises of liberty. *See Morrissey*, 408 U.S. at 482 (holding parole to be cognizable Fourteenth Amendment liberty because it "enables [offenders] to do a wide range of things open to persons who have never been convicted of any crime" such as "to return to society", "be gainfully employed", be "free to be with family and friends and to form the other enduring attachments to normal life"). Assisted suicide accomplishes the purposeful destruction of life and, as a result, forever cuts the victim off from all ties to family, friends, and society. It thus fails to achieve any "benefit" of existence or social inclusion ascertainable under the Constitution.

The Ninth and Second Circuits attempted to graft assisted suicide to the outer branches of the right to accept or refuse medical treatment. *Compassion in Dying*, 79 F.3d at 822-23 (discussing acceptance of morphine drips and refusal of tube-feeding); *Quill*, 80 F.3d at 729 (same). They argued that if the Constitution recognizes a right to make medical decisions, then it should recognize the right to assisted suicide. The courts thus contended that the personal and state interests at stake in treatment refusal and assisted suicide cases are indistinguishable, particularly with respect to their relationship to death.

On the contrary, the right to accept or refuse treatment differs significantly from an interest in suicide assistance

precisely because treatment decisions can enable persons to "engage in the common occupations of life". Moreover, the constitutional strength of an interest in making treatment decisions diminishes as the risk of death increases, while the proposed interest in assisted suicide would increase in strength *because* its objective is death.

This Court has acknowledged the existence of a "right to decide independently, with the advice of [a] physician, to acquire and to use *needed* medication [i.e., essential to health]." *Whalen v. Roe*, 429 U.S. 589, 603 (1977) (emphasis added). Treatment may be necessary to prolong life, to alleviate pain, or to overcome any other maladies which might hinder an individual's capacity to work or to engage in social activities. These benefits undoubtedly comport with the Constitution's life-enhancing objectives.

In addition, this Court has recognized an interest "in avoiding the unwanted administration of . . . drugs". *Washington v. Harper*, 494 U.S. 210, 221-22 (1990). This interest also relates to constitutional objectives by directly implicating the freedom to move about in society unimpeded by the intrusive restraint of a technological apparatus or the forced ingestion of pills or medication. *See Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 269, 278, 279 (1990) (referring to an interest in avoiding unwanted bodily intrusions).

To the extent that a decision to accept or refuse treatment implicates hastened death, this Court has permitted the states to limit the decision maker's discretion. Thus, the states may "prohibit entirely the use of particular drugs" deemed dangerous to the patient's health and safety (*Whalen*, 429 U.S. at 603), and may consider such "dramatic consequences" as death when weighing the policy implications of refusing treatment. *Cruzan*, 497 U.S. at 279. Far from endorsing in these cases any principle that would support the creation of a right to purposely cause death, the Court has permitted the states to circumscribe the right to accept or refuse treatment in direct proportion to the likelihood that

death will result.

Fundamental rights are protected because they enable individuals to live freely and interact socially, even if at times their exercise involves personal risk.[5] The rights to speak, vote, travel, refuse treatment, and so on, could be equated to assisted suicide only by irrebuttably imputing to the citizen who chooses to exercise them in risky situations an inherent desire to be harmed — and by falsely imputing to the Constitution's framers the intent to recognize death as simply another noble objective.

Instead, a constitutionally protected decision to purposely seek death would be unique among all other protected choices. It would embrace a lethal purpose, while the exercise of other rights merely tolerate certain residual and unavoidable risks. Its objective is death rather than life, and its exercise results in irreversible alienation rather than social participation. While the "recognition of any right creates the possibility of abuse" (*Compassion in Dying*, 79 F.3d at 831), a constitutional policy favoring assisted suicide eliminates any contingency by endorsing what is itself a form of abuse. Indeed, the abuses of other freedoms — involving threats against life and self-expulsion from society — would frame the essence of this new right. The dangers its constitutional enshrinement would pose for persons with terminal conditions, other vulnerable populations, and society itself would be of a far greater magnitude than the risks created by the exercise of any other right.

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[5]The Supreme Court has noted that "[s]ome cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. The price may be criticism or ostracism, or it may be violence." *Casey*, 505 U.S. at 867.

B. *A Constitutional Rule Establishing The Freedom To Renounce Society's Protection Of One's Right To Live Would Ratify The Most Extreme Form Of Social And Political Alienation.*

While the assisted suicide claim before this Court ostensibly concerns individual rights, the Court must also consider the social consequences. In particular, constitutionalizing the right to seek to harm one's self with the assistance of others says just as much about the constitutional status of persons granted this right as it says about the right itself. Thus, the question is broader than "does the life-destroying right to assisted suicide share equal billing with other freedoms that are instead life-enhancing?" The inquiry must also focus on why the right to live of some persons should be slashed in value from an unalienable to an alienable constitutional interest.

The Ninth and Second Circuits tied the strength of one's right to live to one's proximity to death, thereby provoking a profound fear among many of those persons in society whose disabilities leave them with an already precarious hold on life. Every person with a disabling condition is already more intensely aware than most of life's contingent nature, even if his or her present condition is not certifiably terminal. Many persons with disabilities were disabled by accidents and thus have peered through the gates of death before medicine made survival possible. Many persons with disabilities rely on high tech interventions to survive, to breathe or to eat, and they are constantly reminded by the nature of their ongoing care that without proper treatment or care they would soon die. Many persons with disabilities depend on the assistance of family, friends, and professional caregivers and must orchestrate ever-shifting schedules simply to meet the minimum requirements of daily living. Some, like the actor Christopher Reeves, cannot function without substantial medical and personal assistance. Most are far less capable than a wealthy movie star of meeting the financial burdens of their care, however, and few enjoy the same public esteem.

Most members of this class are unquestionably more vulnerable to discrimination and social alienation.

Many persons with disabilities exist in a state of "virtual terminality" because the frailty of their physical condition and the specter of death are so intimately woven together. In turn, a constitutional decision asserting that their right to live is constitutionally disposable makes them "virtual aliens" because their most fundamental right — the protection of life — would hang only by the single thread of their own resolve to keep it. They will be left far less secure against both internal and external pressures to give away this right to the unjust advantage of others.

In the end, a condition-based rule in favor of assisted suicide would pour into the Constitution a poisonous concoction of warm-hearted, misguided pity and cold-hearted utilitarianism. The question of "whether we as a society are willing to excuse the terminally ill for deciding that their lives are no longer worth living" would be mixed inextricably with the question of whether assisted suicide should serve as a means "for housecleaning, cost-cutting and burden shifting — a way to get rid of those whose lives we deem worthless." *Compassion in Dying*, 79 F.3d at 856-57 (Beezer, J., dissenting). Who stands to benefit most from a constitutional policy by which the right to live of vulnerable persons is reduced to an alienable interest? Is it the person with a terminal condition bent on suicide regardless of what the Constitution holds, or is it a cost-conscious society seeking more ways to ration its generosity?

C. *A Constitutional Rule Limiting Assisted Suicide To Persons With Terminal Conditions Offers A False And Dangerous Compromise.*

Proponents of assisted suicide strive to appear moderate and attempt to strike a balance between what they perceive to be extremes on both ends of the spectrum. They claim that, while an across-the-board ban is too restrictive for their

tastes, unrestricted suicide is not their aim. They would agree to the construction of what is, in effect, a brick wall across the slippery slope — supposedly to accommodate both the "hard cases" and society's general abhorrence of intentional killing. The Ninth and Second Circuits extended this call for compromise in the constitutional order by overriding the states' uniform bans against assisted suicide, yet nevertheless recommending the adoption of various legislative safeguards. *Compassion in Dying*, 79 F.3d at 832-33; *Quill*, 80 F.3d at 730.

Such appeals for compromise seek to divide permissible from impermissible suicides according to the victim's proximity to death and quality of life. They assume that the desirability of death can and should be balanced against the desirability of life by referring to a person's physical and mental condition. No matter how desperate for death suicidal individuals may be and no matter how little they may value their own lives, their requests to die will be approved only according to a social, not individual, estimation of the comparative values of their life and death. Through such a calculus, the law and the community would sanction death not because the victim wants it, but because the victim who wants it also happens to have a condition that the law and community identify as unworthy of protection.

Moreover, such a policy would still permit the states to punish suicide assistance when the victim is not terminally ill. The retention of a uniform ban evinces the belief that suicide is a bad thing both for the victim and society, and that the law's protection is a benefit — yet *only* if the victim is healthy and expected to live indefinitely. Because the resulting disparity in the level of protection would create an apartheid based on one's health status, the lower courts' assertion that suicide is a constitutional benefit should be rejected on its face.

Why is it beneficial for persons with terminal conditions but no one else to obtain lethal medications to kill themselves? The question calls for a more compelling response

because one can easily infer from the circumstances an invidious motive.[6] A policy which permits lethal assistance for some, but not for the majority, implicates the view that those provided the lethal assistance are less worthy or deserving of protection, and that their lives have less value under the law. Such a policy would fundamentally alter our country's commitment to providing equal protection to vulnerable persons.

As one commentator has written:

> [Our society's] liberal commitment to limited popular government requires a commitment to the equal worth of each person and to limits on the power of government that are contained in the teaching of inalienable rights, especially an inalienable right to life. This teaching forms the essential horizon of liberal theory and it is only within this horizon that liberal regimes and the policies they endorse can take shape. . . . Given the liberal commitment to equality as the precondition of liberty, the "new consensus" [proposing that certain suicides be sanctioned based on the assumption that some lives are less valuable than others] fails completely in its policy recommendations. The policies these writers wish to see adopted logically entail the creation

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[6]A Florida statute making consensual sexual activity with "chaste" minors a crime but not with "unchaste" minors created a similar invidious inference, according to an opinion found in *B.B. v. State*, 659 So. 2d 256 (Fla. 1995). Florida Supreme Court Justice Kogan asserted that such a law

> seems to regard unchaste minors as being somehow less deserving of the state's protection than those who are [chaste]. . . . Any statute that purports to grant special status to a favored group . . . over all others, to my mind at least, must be regarded as inherently questionable. On its face this statute suggests discrimination. . . . Laws should protect everyone, not merely a favored group.

Id. at 260-61 (Kogan, J., concurring).

> of a public standard for determining when some lives are in fact not worth living anymore. However, this is a judgment that is fundamentally inconsistent with the premises of the very regime that is supposed to adopt this policy.

Richard Sherlock, *Suicide and Public Policy: A Critique of the "New Consensus"*, 4 Journal of Bioethics 58, 62 (1982-83).

For this reason, the law should not abandon whole categories of the most vulnerable individuals under the guise of protecting individual rights. Instead, as concluded by the British Medical Association,

> the deliberate taking of a human life should remain a crime. This rejection of a change in the law to permit doctors to intervene to end a person's life is not just a subordination of individual well-being to social policy. It is instead, an affirmation of the supreme value of the individual, no matter how worthless and hopeless that individual may feel.

British Medical Association, *Euthanasia: Report of the Working Party to Review the British Medical Association's Guidance on Euthanasia* 69 (1988).

This Court has assured the Nation that "while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Haig v. Agee*, 453 U.S. 280, 309 (1981) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)). Consistent with this assurance, this Court should reject the Ninth and Second Circuit rulings.

CONCLUSION

For the foregoing reasons, the judgments of the Ninth and Second Circuits should be reversed.

ing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)). Consistent with this assurance, this Court should reject the Ninth and Second Circuit rulings.

CONCLUSION

For the foregoing reasons, the judgments of the Ninth and Second Circuits should be reversed.

Respectfully submitted,

Of Counsel:

PAT A. CIPOLLONE
General Counsel

CARL A. ANDERSON
Vice President for Public Policy
KNIGHTS OF COLUMBUS

JAMES BOPP, JR.
THOMAS J. MARZEN
DANIEL AVILA*
JANE E.T. BROCKMANN
NATIONAL LEGAL CENTER FOR THE MEDICALLY DEPENDENT & DISABLED, INC.
50 South Meridian, Ste. 200
Indianapolis, Indiana 46204
317-632-6245

*Counsel of Record

Dated: November 12, 1996*

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*Marci Ferree, student at Valparaiso University School of Law under the supervision of Professor John Potts, provided research for this brief.